

NASHCRYSTAL MOTORS (PRIVATE) LIMITED  
versus  
TOTAL ZIMBABWE (PRIAVTE) LIMITED  
and  
DRAWCARD ENTRPRISES (PRIVATE) LIMITED

HIGH COURT OF ZMBABWE  
MUZENDA J  
MUTARE, 25 November 2024

**Pretrial Conference:**

Mr. *C Ndlovu*, for the Plaintiff  
Mr. *B. S Zuwa*, for the first defendant  
Professor *W. Ncube*, for third defendant

MUZENDA J: On 28 October 2024 I gave the following order:

- “ 1 It is ordered that proceedings are stayed until the determination of the Constitutional Court application filed by the (Plaintiff) Applicant.
- 2 Plaintiff is ordered to pay 1<sup>st</sup> and 3<sup>rd</sup> defendants’ counsel’s travelling costs.”

The third defendant then requested for reasons for the postponement. These were my reasons.

On 23 October 2024 plaintiff’s counsel of record wrote to the Deputy Registrar, Mutare advising of plaintiff’s intention to make an application on the hearing date, 28 October 2024, to have the matter postponed to a later convenient date because Advocate *L Uriri* was not available. In response to the same letter third defendant’s counsel wrote a letter indicating that third defendant will oppose the application for postponement since such would prolong and delay the resolution of the dispute.

On the date of hearing Mr. *C Ndlovu* who appeared on behalf of the plaintiff submitted that after plaintiff had received the Supreme Court judgment, it decided to seek the involvement of the Constitutional Court specifically for the latter to interpret what plaintiff perceives to be unequal protection of the law on the aspect of prescription. The plaintiff had since filed the application for leave to approach the Constitutional Court and had equally since served same on all interested parties, the defendants *in casu*. It was a further view of the plaintiff that if the main matter is

allowed to proceed to finality, in the event that the Constitutional Court upholds or grants plaintiff's application, such an order would but amount to a *brutum fulmen* and purely academic. It was therefore plaintiff's prayer that the proceedings be held in abeyance until the determination of the chamber application for leave for plaintiff to approach the Constitutional Court

In opposing the application for postponement Mr. *Zuwa* for first defendant chronicled the events from the date when the Supreme Court order was granted, impugning the lackadaisical laissez-faire attitude of plaintiff, being reluctant to finalise proceedings remitted by the Supreme Court back to me. He pointed out further, that the matter was initially set down for hearing on 11 September 2024 and plaintiff did not attend. Plaintiff also took time to even file the chamber application with the Constitutional Court. He however conceded that he was aware of the Constitutional Court application. He went on to cite the case of *Commercial Farmers Union v Mhuriro and Others* 2000 (1) ZLR 405 (S) per GUBBAY CJ on p 405 E-F where the Supreme Court held that the High Court has no jurisdiction to interfere with the order of the Supreme Court and urged the court to be guided by that decision.

He also further submitted that the filing of the Constitutional Court application does not stay the High Court proceedings and to first defendant plaintiff did not cite any case law authority to support such a move by this court. There was virtually no good cause relied upon by plaintiff for postponement and urged the court to decline postponement. He however added that in the event of the court postponing the matter plaintiff had to pay punitive costs especially for lawyers who had traveled to attend court.

Professor *W. Ncube* in opposing the application submitted that plaintiff's sole intention was to continuously buy time and equally so the Constitutional Court application was to gain more time. To the third defendant the plaintiff lost the matter in the Supreme Court but still enjoys occupation. Third defendant was prejudiced by any further delays in resolving the matter moreso taking into account that plaintiff is not paying rentals. To the third defendant the balance of convenience favours that the proceedings be allowed to proceed. Professor *Ncube* in addition submitted that the Supreme Court decision was uploaded on 31 July 2024 and it was now three (3) months down the line and plaintiff had done nothing to pursue the Constitutional Court application until 26 September 2024 and the application for direct access was filed on 26 September 2024 to the Constitutional Court but plaintiff deliberately did not immediately serve it on third defendant. Plaintiff only did so on 11 October 2024 that was when third defendant became aware of same and

opposed it on 16 October 2024. Third defendant agreed with first defendant's earlier submission that this court does not enjoy the luxury of staying a Supreme Court order. The best course open to plaintiff was to file an application at the Constitutional Court for stay of proceedings pending the determination for direct access. In third defendant's view, the application for postponement or stay of proceedings had no merit because third defendant was ready to proceed.

On the aspects of costs third defendant's counsel submitted further that in an application for postponement, the litigant seeking such a postponement is obliged to tender costs, the only issue to third defendant was whether costs be punitive or ordinary scale and third defendant prayed for costs on a punitive scale or legal practitioner-client scale.

In response Mr. *Ndlovu* submitted that he was only given instructions on Friday 24 October 2024 and that parties had been forewarned of plaintiff's intention to apply for a postponement and added that a litigant has a duty to mitigate its costs.

### **Disposition**

Most facts are common cause. There is a Supreme Court order directing this court to determine the plaintiff's alternative claim as well as third defendant's counter-claim for eviction. After receipt of the Supreme Court decision plaintiff felt that it was discriminated against in contravention of s 56 of the Constitution which speaks of "Equality and non-discrimination" and right to equal protection and benefit of the law. In the main matter involving the parties herein which was the subject for decision by the Supreme Court, it was held by Judges of Appeal that prescription can be legally raised as a defence by a third party. This position of the law is the pith that triggered plaintiff to seek direct access to the Constitutional Court.

Looking at my judgment in the main matter, I am constrained to agree with the defendants that plaintiff's application for direct access can be termed frivolous and vexatious. That point raised by plaintiff in my view accords well with development of jurisprudence or further development of the law in line with the Zimbabwean Constitution. If it happens that the Constitutional Court will accept plaintiff's application for direct access then the proceedings before me would definitely become purely academic.

I am fully cognisant of the decision by the Supreme Court in the case of *Commercial Farmers Union v Mhuriro and Others (supra)* the first respondent had filed a chamber application with the High Court; seeking to interdict the police from carrying out evictions ordered by the

Supreme Court pending the institution of a class action in the Supreme Court by the respondent. The application was granted by the Judge President. Applicant applied to the Supreme Court for an order setting aside the High Court order, on the grounds of lack of jurisdiction; that is when it was held that the High Court had no jurisdiction to interfere with the order of the Supreme Court. *In casu* I perceive a difference of great magnitude, this court is far from meddling with a Supreme Court decision or order, and it has been accepted by all sundry there is a pending court application for direct access seized with the Constitutional Court and applicant/plaintiff seeks postponement of current proceedings ordered by the Supreme Court to wait for the outcome of the chamber application for direct access, if its accepted then all would wait for the decision, if its rejected then the matter before me would instantly resume.

In the matter of *Galante v Galante* (3) 2002 (1) ZLR 501 (H) this court per SMITH J crisply and lucidly sets out the legal principles relevant to the application for a postponement.

1. The court has a discretion, to be exercised judicially, to an application, to grant or refuse such an application.
2. The court should be slow to refuse a postponement where the true reason for a party's non-preparedness has been fully explained and is not a delaying tactic, and where justice demands that the party should have further time for the purpose of preparing his or her case.
3. An application for postponement must be made as soon as the circumstances justifying the application becomes known to the applicant, though the court may in an appropriate case allow an application that has not been made timeously.
4. An application for postponement must always be bonafide and that merely a tactical maneuver for the purpose of obtaining an advantage to which the applicant is not entitled.
5. Prejudice is the main consideration. The court must weigh the prejudice to the respondent if the applicant is granted a postponement against the prejudice to the applicant if a postponement is refused, and must consider whether any prejudice caused to the respondent can fairly be compensated by an appropriate order of costs or in some other way.
6. No party to an action can claim a postponement as of right, on the ground that any prejudice to the other side can be remedied by an appropriate order of costs.
7. Where an application for postponement is not made timeously or the applicant is otherwise to blame, but a postponement is nevertheless justified in the circumstances of the case, the

court may in its discretion allow a postponement but direct the applicant to pay the wasted costs on the higher scale.

The order of the Supreme Court does not contain an order with execution as one in the *Commercial Farmer's Union*. It ordered a reopening of the closed proceedings for this court to determine issues which were deemed unnecessary when the order appealed against was granted. In other words the Supreme Court order in principle declared the proceedings before me incomplete till I have decided plaintiff's alternative claim and third defendant's counter-claim for eviction. These are the proceedings I have held in abeyance pending outcome of the chamber application filed by applicant/plaintiff in the Constitutional Court. Hence for all intents and purposes the application before me is one for a postponement not one for stay of execution of a Supreme Court order which obviously I would not have powers to interfere with.

The balance of convenience more heavily favours the postponement of the matter. In any case it will be for a short space of time and since first and third defendant's counsel had travelled for first defendant from Harare to Mutare and for third defendant, from Bulawayo to Mutare applicant/plaintiff will be ordered to pay both counsel's travelling costs.